

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 9 of the Environmental Conservation Law (“ECL”) of the State of New York and Title 6, Part 190 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

ORDER

DEC Case No.
R5-20121206-2042

-by-

MARK A. DEMEO,

Respondent.

This administrative enforcement proceeding concerns allegations that respondent Mark A. DeMeo (“respondent”) has violated ECL 9-0303(2) and 6 NYCRR 190.8(w) by using and maintaining a portion of a structure on State lands in the Town of Northampton, Fulton County, without a permit or other authorization from the New York State Department of Environmental Conservation (“Department”). Specifically, staff alleges that a portion of respondent’s structure known as the Campers Last Stop store encroaches on State lands.

Department staff commenced this proceeding by service upon respondent of a notice of hearing and complaint dated January 21, 2014. The matter was assigned to Administrative Law Judge (“ALJ”) Edward Buhrmaster in July 2014, and an adjudicatory hearing was held over two days, December 17, 2014 and January 21, 2015. At the hearing, Department staff presented three witnesses: (i) Matthew Ginter, code enforcement officer for the Town of Northampton; (ii) Scott Orr, a senior land surveyor employed by the Department; and (iii) Christopher Schlegel, a neighbor of respondent. Respondent presented one witness, Mark Blackstone, a licensed land surveyor. Respondent did not testify.

Department staff has requested that I issue an order:

- finding that respondent committed the encroachment violation alleged;
- assessing against respondent a civil penalty in the amount of one hundred dollars (\$100);
- directing respondent to remove from State lands, within ninety (90) days of service of the order upon respondent, all portions of the building known as Campers Last Stop store that are on State lands, and to restore the State lands by filling holes and other areas of excavation, burying boulders, grading to

create a uniform and smooth soil surface, applying an adequate layer of topsoil, seeding with appropriate seed mix, and applying mulch;

- authorizing staff to remove the portion of the building that is occupying State lands in the event that respondent fails to do so; and
- granting such other and further relief as I may deem appropriate (see Complaint, Hearing Exhibit A, at 3-4, Wherefore Clause ¶¶ I-V).

At the hearing, the ALJ granted Department staff's oral motion to amend the complaint: (i) to allege that additional structures owned by respondent may also encroach on State lands; and (ii) to add to the requested relief a requirement that respondent post a performance bond in an amount adequate to cover the costs of removing any encroachments upon State lands (see Hearing Transcript at 23-36). Shortly after the hearing, ALJ Buhrmaster directed staff to provide a written explanation of DEC's legal authority to require a performance bond, and granted respondent an opportunity to file a written response. (see January 26, 2015 Letter from ALJ Buhrmaster to the parties). Upon review of the submissions, the ALJ concluded that a performance bond was not warranted here.

In his hearing report, which is attached hereto, ALJ Buhrmaster recommends that I hold respondent liable for the violation alleged and impose upon respondent a civil penalty in the amount of one hundred dollars (\$100). The ALJ also recommends that I order respondent to remove the portion of respondent's store that encroaches on State land "and all other encroachments" from respondent's property, pursuant to a Department-approved plan to be submitted by respondent and that any plan submitted by respondent must be approved by staff, and should establish procedures and timeframes by which to complete each activity (see Hearing Report at 37-38).

The ALJ also requests that I direct staff to conduct a site visit to: "confirm[] on the ground the boundary line between the properties of Mr. DeMeo and the State, as depicted on [the] survey map" prepared by staff's witness Scott Orr (Hearing Report at 37); and determine if any other structures on respondent's property and "infrastructure associated with Mr. DeMeo's use of his property also encroach on State land" (id.).

The ALJ did not set forth any time frames with respect to implementation of a remedy or payment of the civil penalty. I adopt the ALJ's hearing report, in part, as my decision in this matter, subject to my comments in this order. As discussed below, I am remanding this matter to the Office of Hearings and Mediation Services for a further review relating to remedial relief.

DISCUSSION

A. Liability

ECL 9-0303(2) provides as follows: “Structures. No building shall be erected, used or maintained upon state lands except under permits from the department.” Section 190.8(w) of the Department’s regulations provides in relevant part as follows: “No person shall erect, construct, install, maintain, store, discard or abandon any structure ... on State lands or subsequently use such structure ... on State lands, except if the structure ... is authorized by the department.”

The record indicates that respondent did not erect the camp store, and that he purchased the property on which it is located years after its construction. The store structure was built at least 50 years ago, and the store was operated by the prior owner before it was purchased by respondent (see Hearing Report at 6 [Finding of Fact 7]). Respondent purchased the property in 1996 (see id. at 5 [Finding of Fact 1]), and has operated a seasonal business at the store for a number of years (see Hearing Transcript at 22, 88).

Staff satisfied its burden to establish, by a preponderance of the evidence, that respondent, since his purchase of the property, has maintained and used a structure, a portion of which is on State lands, and that respondent does not possess a permit or other authorization issued by the Department for such maintenance and usage.¹

Based upon survey measurements made in 1931 and thereafter, the evidence established that respondent’s store encroaches on State lands by more than 8 feet (see e.g. Hearing Transcript at 122; see also Hearing Exhibit 4, Detail A). Thus, staff has established that respondent has violated ECL 9-0303(2) and 6 NYCRR 190.8(w).²

B. Civil Penalty

Staff requests, and the ALJ recommends, that I impose a civil penalty of one hundred dollars (\$100), which is the maximum civil penalty set forth in ECL 71-0703(1). On this record, the requested penalty is authorized and appropriate. This order directs that respondent pay the civil penalty within fifteen (15) days of service of this order upon him.

¹ Counsel for respondent apparently argues that the “clear and convincing” standard of proof is applicable here (see Hearing Transcript at 481-482). As the ALJ correctly held, however, the standard of proof applicable in this enforcement proceeding is the preponderance of the evidence standard (see Hearing Report at 19; see also 6 NYCRR 622.11[c]). Other than the statement that no record exists that the Department had issued a temporary revocable permit to respondent, I do not adopt the ALJ’s comments on the use of temporary revocable permits (see e.g. Hearing Report at 29).

² Respondent offers what it describes as a “fairness” or “equity” argument, claiming that the amount of property at issue is “very small” and that “the State appears to have no real need or reason to take this property back, it’s not like they’re doing any improvements that we’re interfering with” (Hearing Transcript at 22). This argument disregards principles of real property law and, moreover, that the property at issue here are State lands with constitutional protection (see also Hearing Transcript at 494-495 [counsel for staff stating that the Legislature has charged the Department with the care, custody and control of the Forest Preserve]).

C. Remedial Relief

Although the ALJ recommends that respondent be directed to remove all portions of respondent's Campers Last Stop store that are located on State lands, based upon my review I conclude that the proceeding did not fully develop the record regarding remedial relief and therefore I do not accept the ALJ's recommendation. For example, the record does not furnish information regarding how much longer respondent intends to operate his seasonal business on the property or the anticipated structural life of the camp store.

Accordingly, I hereby remand the matter for a continuation of the hearing with respect to remedial relief.

During the proceeding, staff raised allegations regarding other structures, including but not limited to an underground septic tank, that may encroach on State lands from respondent's property. As noted on page 2 of this order, the ALJ granted staff's motion to amend its complaint to include allegations regarding these other structures (see Hearing Transcript at 27). Staff witness Christopher Schlegel, a neighboring property owner, testified that other of respondent's structures, including the underground septic tank, also encroach on State lands (see Hearing Transcript at 286-310). Mr. Schlegel created a drawing at the hearing to support his testimony (see Hearing Exhibit 38-A). Mr. Schlegel is not a surveyor, however, and nothing further was offered to support the claims regarding additional encroachments. The evidence submitted was not sufficient to find a violation with respect to these additional structures. Whether other structures are encroaching on State lands is an appropriate factor to consider.

The ALJ recommended that staff conduct a site visit.³ I agree that a site visit would be useful and that, during such visit, markers could be placed on or near the sides of the Campers Last Stop store by which staff indicates where the store encroaches on State lands. During the site visit, the existence and extent of other possible encroachments from Mr. DeMeo's property onto State lands may be determined. The record should be developed as to when any such encroachments first occurred and who was responsible for the encroachments -- whether it was respondent, the prior owner of the property or a third party.⁴

In summary, upon remand, consideration should be given to:

- the expected duration of future use of the Campers Last Stop store and its estimated structural life;
- the existence of any other structures and infrastructure on respondent's property that are also encroachments on State lands, the date when any such structures or

³ Respondent informed staff in 2003 that he had obtained the services of an engineering firm for the purpose of surveying the property, but he has never produced such survey (see Hearing Exhibit 24 [Affidavit of Department environmental engineer Brian Huyck], at ¶ 17, and Exhibit 3 attached thereto). Furthermore, the record does not reflect the number of contacts, if any, initiated by either party between respondent's 2003 letter and the commencement of this proceeding in January 2014. This should be more fully explored upon remand.

⁴ Because the ALJ who presided over the initial hearing has retired, a new ALJ will be assigned to this matter.

infrastructure were constructed or placed on State lands, and who was responsible for creating those encroachments; and

- options to consider for addressing the encroachments.

In the event that the hearing on remedial relief is not concluded by October 14, 2016, I direct the presiding ALJ to submit a status report on the proceeding to my office by the following week, with copies to Department staff and respondent. The status report should: set forth the events that have occurred (for example, the dates of any completed site visit and hearing sessions); outline the anticipated future schedule relating to the proceeding; and note any settlements reached between Department staff and respondent.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Respondent Mark A. DeMeo is adjudged to have violated ECL 9-0303(2) and 6 NYCRR 190.8(w) by using and maintaining on State lands a portion of a structure that he owns, known as Campers Last Stop store.
- II. Respondent Mark A. DeMeo shall, within fifteen (15) days of service of this order upon him, pay a civil penalty in the amount of one hundred dollars (\$100). Payment shall be made in the form of a certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation, and shall be sent to the following address:

Scott Abrahamson, Esq.
Assistant Regional Attorney
New York State Department of Environmental Conservation
Region 5, P.O. Box 296
1115 NYS Route 86
Ray Brook, New York 12977

- III. This matter is remanded to the Office of Hearings and Mediation Services for a hearing to further develop the record with respect to remedial relief. Such hearing should also include a site visit to:
 - (A) identify the presence and extent of any structures or infrastructure that are on the property of respondent Mark A. DeMeo in the Town of Northampton, Fulton County, New York, in addition to the Campers Last Stop store, that are encroachments on State lands; and
 - (B) obtain information that the administrative law judge determines would be of benefit to the record.

- IV. The provisions, terms and conditions of this order shall bind respondent Mark A. DeMeo and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
August 15, 2016

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NY 12233-1550

In the Matter

of -

Alleged Violation of Article 9 of the
New York State Environmental Conservation Law
("ECL") and Title 6, Part 190, of the Official
Compilation of Codes, Rules and Regulations of the
State of New York ("NYCRR")

by -

MARK A. DEMEO

Respondent

NYSDEC Case No. R5-20121206-2042

HEARING REPORT

- by -

_____/s/_____
Edward Buhrmaster
Administrative Law Judge

June 10, 2015

PROCEEDINGS

This enforcement action was initiated by service of a Notice of Hearing and Complaint (Exhibit A) on the respondent, Mark A. DeMeo, by certified mail on January 22, 2014, and by personal service on January 29, 2014. (See affidavit of service by mail, Exhibit B, and affidavit of personal service, Exhibit C.)

The complaint, dated January 21, 2014, alleged that Mr. DeMeo has used and maintained a portion of a structure, known as the Campers Last Stop store, on State land in the Town of Northampton, Fulton County, without a permit or other authorization from the New York State Department of Environmental Conservation ("DEC").

Mr. DeMeo filed an answer to the complaint, dated February 20, 2014 (Exhibit D), and attended a pre-hearing conference with DEC Staff on February 27, 2014. In the absence of a settlement, DEC Staff counsel Scott Abrahamson submitted a statement of readiness for adjudicatory hearing, dated June 4, 2014 (Exhibit E), consistent with Section 622.9 of Title 6 of the Codes, Rules and Regulations of the State of New York ("6 NYCRR 622.9"). (See affidavits indicating mail service of statement of readiness on Mr. DeMeo on June 5, 2014, and personal service of statement of readiness on Mr. DeMeo on June 20, 2014, which are Exhibits F and G, respectively.)

Under a cover letter of July 2, 2014 (Exhibit H), Mr. Abrahamson provided the statement of readiness and copies of the pleadings to DEC Chief Administrative Law Judge James T. McClymonds, who then assigned me to hear the matter, as confirmed in his letter to the parties, dated July 16, 2014 (Exhibit I).

After my assignment, Mr. DeMeo retained an attorney, Keith R. Gorman, whose office is in Latham, New York. Following a conference call with Mr. Gorman and Mr. Abrahamson on July 22, 2014, I issued a Notice of Hearing (Exhibit J) scheduling a hearing for July 30, 2014, at DEC's Central Office, located at 625 Broadway, Albany. (The distribution list for the hearing notice is Exhibit K.)

After appearances were taken on July 30, 2014, the hearing was adjourned for about an hour for discussions between the parties. The discussions culminated in a proposed settlement that Mr. Gorman said was agreeable to Mr. DeMeo. The hearing was then suspended to allow the parties an opportunity to convert the settlement into a consent order, which they anticipated would be executed before September 30, 2014. (The transcript of the July 30, 2014, hearing date is Exhibit L.)

On September 18, 2014, Mr. Abrahamson provided a letter (Exhibit M) proposing that the hearing be rescheduled, attached to which was correspondence from Mr. Gorman indicating that Mr. DeMeo had several concerns about the proposed settlement and had retained a surveyor to review the matter. At the request of DEC Staff, I set the hearing for October 9, 2014, at DEC's Region 5 sub-office in Warrensburg, as confirmed in a Notice of Hearing Rescheduling, dated September 23, 2014 (Exhibit N).

As before, on the October 9, 2014, hearing date, the parties conferred directly with each other, and then with me, about a potential settlement. Though no substantive agreement was reached, the parties agreed to postpone the hearing until December 17, 2014, affording additional time for communications between the parties' surveyors. I confirmed this understanding in a second Notice of Hearing Rescheduling, dated October 17, 2014 (Exhibit O).

In the absence of a settlement, the hearing went forward as scheduled on December 17, 2014, at DEC's Central Office, 625 Broadway, Albany. To complete witness testimony, the hearing continued there on January 21, 2015. Mr. Abrahamson represented DEC Staff, and Mr. Gorman represented Mr. DeMeo.

Three witnesses testified for DEC Staff: Scott Orr, DEC senior land surveyor; Matthew Ginter, the Town of Northampton code enforcement officer; and Christopher Schlegel, a construction company operator who lives on property next to the Campers Last Stop store. Mr. DeMeo did not testify; however, Mark Blackstone, the surveyor he had retained, testified on his behalf.

The evidentiary record consists of a 501-page transcript compiled during the two days of testimony, as well as various

documents. Attached to this hearing report is a list of exhibits (1 - 44) that were presented by the parties and marked for identification. (All were received in evidence except Exhibits No. 34, 37, 41, 42 and 43.) The list also includes the 15 exhibits (A - O) referred to above, which I took into the record myself, not as evidence but to confirm how the matter proceeded to hearing. Finally, the file includes additional correspondence between me and the parties' counsel.

Rather than file post-hearing briefs, the parties' counsel made oral closing statements at the conclusion of testimony on January 21, 2015. Like their opening statements, the closing statements are recorded in the hearing transcript.

In response to my letter of January 26, 2015, the parties made written submittals concerning DEC's legal authority to require a performance bond as part of DEC Staff's proposed relief. As directed, DEC Staff provided a memorandum of law dated February 4, 2015, to which the respondent replied with its own memorandum of law dated February 11, 2015.

On May 27, 2015, I circulated a list of proposed transcript corrections to the parties' counsel, who were provided an opportunities to offer objections and to propose corrections of their own. No objections were made, and no additional corrections were proposed. In the absence of objections, my listed corrections have been written into the transcripts of each day's testimony.

POSITIONS OF THE PARTIES

Position of DEC Staff

According to DEC Staff, Mr. DeMeo operates a retail business, known as the Campers Last Stop store, largely on property he purchased in 1996 on Houseman Street in the Town of Northampton, Fulton County. DEC Staff alleges that a portion of the store, which was built many decades before Mr. DeMeo acquired the property, encroaches on State forest preserve associated with the Northampton Beach campground, and that Mr. DeMeo's continuing use and maintenance of the building, in the

absence of a permit from DEC, is in violation of ECL 9-0303(2) and 6 NYCRR 190.8(w).

According to DEC Staff, the encroachment of the store on State land was confirmed by its own survey work completed in 2002, and Mr. DeMeo was informed of the encroachment and the alleged violation that same year. DEC Staff asserts that Mr. DeMeo has taken no action to remove the encroachment, and that associated improvements including a storage building constructed since Mr. DeMeo's purchase of the store property, and a septic system that serves the store, may also encroach on State property. Furthermore, DEC Staff claims that, prior to issuance of its complaint, Mr. DeMeo offered no evidence to rebut DEC's finding about the store's encroachment, despite his assurance in 2003 that he had obtained someone to do a survey on his behalf.

By way of relief, DEC Staff proposes that the Commissioner assess a civil penalty against Mr. DeMeo in the amount of \$100, which Staff claims is the statutory maximum penalty for violation of ECL 9-0303(2) and 6 NYCRR 190.8(w). DEC Staff also proposes that the Commissioner order Mr. DeMeo to remove any portion of the store or other structure that encroaches on State land, and to post a performance bond in an amount adequate to address the costs of removing all encroachments that exist, in the event he fails to perform and DEC does the work itself.

DEC Staff proposes not only the removal of encroachments, but the restoration of impacted State lands by filling holes and other areas of excavation, burying boulders, grading to create a uniform and smooth soil surface, applying an adequate layer of topsoil, seeding with appropriate seed mix, and applying mulch. Furthermore, DEC Staff proposes that the removal of encroachments from State lands and the restoration of those lands be completed no later than 90 days after service of a Commissioner's order.

Position of Respondent

According to Mr. DeMeo, the complaint should be dismissed on the basis that DEC Staff did not meet its burden of proving the alleged violations. Mr. DeMeo does not concede any encroachment on State property and disputes DEC's finding to the contrary. According to Mr. DeMeo, DEC Staff's 2002 map is based

on a questionable correction of a 1925 distance measurement in the survey books of the Hudson River Regulating District, and no specific probative evidence exists to show why the correction was made and why the original measurement was erroneous. He says that, because of disagreements between the parties' surveyors, there is no clear and convincing evidence that the State's survey map is correct.

Mr. DeMeo says that he did not build the Campers Last Stop store and that DEC Staff concedes the structure was built in the 1940s or 1950s, long before he bought the property. Even if the Commissioner finds that the store encroaches on State property, Mr. DeMeo says there is no viable reason for ordering the removal of the encroachment, since DEC does not allege that it needs the impacted property for improvements or some other benefit to the people of the State. Furthermore, Mr. DeMeo argues that the cost of removing any encroachment would be exorbitant, effectively destroying his seasonal business, which offers benefits for users of the adjacent DEC campground.

Finally, Mr. DeMeo claims DEC lacks the power to require that he post a performance bond to ensure the removal of encroachments that are determined to exist.

FINDINGS OF FACT

1. On May 17, 1996, Mark A. DeMeo, the respondent in this matter, purchased real property at 324 Houseman Street in the Town of Northampton, Fulton County, by deed from John Blizzard. (A copy of the deed, retrieved from the Fulton County Clerk's office, was received as Exhibit No. 21.)

2. This property shares a boundary with property of the State of New York, also in the Town of Northampton, which was conveyed to it in 1929 by deed from Leroy W. Wood. (A copy of the deed, retrieved from the Fulton County Clerk's office, was received as Exhibit No. 10.)

3. The deed from Wood described the property conveyed to the State, approximately 49.37 acres, as "substantially and relatively that which is designated as Tract 657 on the maps of the proposed Sacandaga Reservoir filed by the Board of the Hudson River Regulating District in the Fulton County Clerk's

Office on March 13, 1924." (A portion of a map showing Tract 657, prepared for the Hudson River Regulating District and maintained by DEC, was received as Exhibit No. 11. The boundary between the properties of the State and Mr. DeMeo occurs along a portion of the line segment between highlighted points 7 and 8 on the first page of the exhibit.)

4. Mr. DeMeo's property is identified as Lot No. 29 on a Fulton County tax map received as Exhibit No. 3. As noted on that map, the property, which is highlighted in yellow, is a triangular lot with dimensions of about 125 feet (along Houseman Street), 103.4 feet (along the property of a neighbor, Christopher Schlegel, which is identified as Lot No. 27.5), and 162 feet (along the State property line at issue in this hearing). (Orr: transcript, pages 98 - 101.)

5. Mr. DeMeo's property includes a structure known as the Campers Last Stop store. (Exhibits No. 5 and 6 are photographs of the store, taken by Mr. Orr from Houseman Street, and Exhibit No. 7, another photograph taken by Mr. Orr from the State property, shows the back of the store, on the right side of the photograph, as well as a storage building that was erected by Mr. DeMeo.)

6. The Campers Last Stop store, at 324 Houseman Street, exists just outside the entrance booth of the Northampton Beach public campground and day use area, which is operated by DEC and located at 328 Houseman Street. (The store's location is highlighted on a campground map received as Exhibit No. 2, as well as on a map of the surrounding area, received as Exhibit No. 1, which shows the campground's location on Great Sacandaga Lake, within the Adirondack Park.) (Orr: transcript, pages 95 - 97.)

7. The Campers Last Stop store was built at least 50 years ago and was operated by John Blizzard before he sold the property to Mr. DeMeo. (Schlegel: transcript, page 307.)

8. In July 2000, a DEC team led by Scott Orr began a survey of the Northampton campground as a basis for ensuring the correct location of a new boundary fence that would replace an existing fence erected by the State on the east side of Houseman Street. The existing fence runs perpendicular to Houseman Street between the street and the Sacandaga Reservoir. (Orr: transcript, pages 103 - 104 and 111 - 113.)

9. After initial research, the field portion of the survey occurred over about six days, concluding in April 2002. (Orr: transcript, pages 103 - 107.) (The notes for the survey were recorded in a hand-written field book, which was received as Exhibit No. 3-A.)

10. The survey resulted in a map (dated April 7, 2002, and received as Exhibit No. 4) which shows the aforementioned fence line on the east side of Houseman Street, as well as a separate fence line on the west side of the street, behind the Campers Last Stop store. (The latter fence line is highlighted in pink on Detail "A" of the survey map.)

11. The survey map, prepared by Mr. Orr, shows that the fence line on the west side of Houseman Street does not represent the boundary between the properties of Mr. DeMeo and the State, and that the boundary (highlighted in yellow on Detail "A") actually runs through the middle of the Campers Last Stop store and a covered patio attached to the store's north end. (Orr: transcript, pages 114 - 117.)

12. As shown in Mr. Orr's map, the back of the store encroaches on State land by about 8.3 feet on its south end, and by about 8.9 feet on its north end, where the patio is located. (Orr: transcript, page 122.)

13. Although DEC issues temporary revocable permits for activities on State-owned land administered by its Division of Lands and Forests, no such permit has been issued to the Campers Last Stop store or to Mr. DeMeo, according to a search of DEC records for the years since 2000. (Peter Frank affidavit, Exhibit No. 23.)

14. At the request of DEC Region 5 Staff, Brian Huyck, a DEC engineer, met with Mr. DeMeo on May 31, 2002, at the Campers Last Stop store, and provided him a copy of the survey map showing the extent to which the store encroached on State land. (Brian Huyck affidavit, Exhibit No. 24, paragraphs 7 and 8.)

15. Mr. Huyck's responsibility at the time of the meeting was to work with Mr. DeMeo to remove the encroachment. (Exhibit No. 24, paragraph 7.)

16. Following the meeting, Mr. Huyck sent Mr. DeMeo a letter dated August 26, 2002, which quoted the requirement at ECL 9-0303(2) that no building shall be erected, used or maintained on State lands except under permits from DEC. The

letter said that DEC Staff was not aware of any records which may have provided authorization for Mr. DeMeo's building to occupy State land, and that DEC was not able to issue a permit for the structure. Therefore, the letter continued, the unauthorized existence of the building and any associated items on State land constituted a violation of the ECL. (The letter, referred to in paragraph 9 of Exhibit No. 24, is attached to that document as Exhibit No. 1.)

17. At the end of his letter of August 26, 2002, Mr. Huyck reminded Mr. DeMeo that, at the conclusion of their meeting, DEC Staff had provided Mr. DeMeo an opportunity to seek legal advice or contact a licensed land surveyor. Mr. Huyck then asked Mr. DeMeo to contact DEC by September 30, 2002, in order to schedule a meeting to discuss his representatives' findings or his intentions toward correcting the encroachment. (Exhibit No. 24, paragraph 10.)

18. Receiving no response to his letter, Mr. Huyck addressed another letter to Mr. DeMeo, dated May 7, 2003, asking that he contact DEC by June 1, 2003, and informing him that failure to do so in a timely manner would result in the matter being referred to DEC's Region 5 attorney for enforcement. (The letter, referred to in paragraph 11 of Exhibit No. 24, is attached to that document as Exhibit No. 2.)

19. Although he did not respond as requested, Mr. DeMeo sent Mr. Huyck a letter dated November 6, 2003, advising him that Mr. DeMeo had obtained the services of Steven E. Smith Engineering & Architecture for the purpose of surveying his property to better prepare him in resolving questions about this matter. (The letter, referred to in paragraph 12 of Exhibit No. 24, is attached to that document as Exhibit No. 3.)

20. As of October 2014, the date of his affidavit, Mr. Huyck had received nothing from the Smith firm or anyone else claiming to speak on Mr. DeMeo's behalf regarding the store's encroachment on State land. (Exhibit No. 24, paragraph 13.)

21. Because it became clear to Mr. Huyck that Mr. DeMeo had no intention of cooperating with DEC to resolve this matter, Mr. Huyck referred it to DEC Region 5's Office of General Counsel for administrative proceedings. (Exhibit No. 24, paragraph 14.)

22. Since purchasing the property on which the Campers Last Stop store is located, Mr. DeMeo has built a storage

building there that may also encroach on State land. (The approximate location of the storage building is shown on a sketch by Mr. Schlegel depicting his and Mr. DeMeo's adjoining properties, received as Exhibit No. 38-A.) (Schlegel: transcript, pages 302-304.)

23. The store's septic system may also encroach upon State land, based on the location of the septic tank cap some years ago (as shown by Mr. Schlegel on Exhibit No. 38-A.) (Schlegel: transcript, pages 307-308.)

DISCUSSION

This matter involves charges that Mr. DeMeo used and maintained a portion of his Campers Last Stop store on State land without a permit or authorization from DEC. These activities are charged as a violation of both ECL 9-0303(2), which states that "[n]o building shall be erected, used or maintained upon State lands" except under DEC permits; and the corresponding regulation at 6 NYCRR 190.8(w), which states similarly that "[n]o person shall erect, construct, install, maintain, store, discard or abandon any structure or any other property on State lands or subsequently use such structure or property on State lands," except if the structure or property is authorized by DEC or meets certain other specifications, none of which are relevant here.

Because the charges hinge on the store being located in part on State lands, they depend on the accuracy of Mr. Orr's survey map (Exhibit No. 4), most particularly its depiction of the boundary between the State's property and that of Mr. DeMeo. I find that the boundary is accurately depicted on the map and that, as shown there, the back of the Campers Last Stop store encroaches on State land by more than eight feet. Also, in the absence of any evidence to the contrary, I find that this encroachment exists without the State's permission or authorization, which makes Mr. DeMeo's continued use and maintenance of the store a violation of both ECL 9-0303(2) and 6 NYCRR 190.8(w), as charged by DEC Staff.

Orr Survey

As mentioned above, Mr. Orr's survey of the Northampton campground was initiated to ensure the correct location of a State boundary fence on the east side of Houseman Street. As shown on the survey map, that fence runs roughly perpendicular to Houseman Street between the street and the Sacandaga Reervoir, and a portion of it encroaches on private land.

Mr. Orr described his effort as a "retracement survey," meaning that it involved retracing lines determined in previous surveys, on the basis of monumentation found in the field while walking in the earlier surveyors' footprints. (Transcript, pages 187 - 188.) For the points numbered 1 to 9, which are highlighted in red on the survey map, that monumentation consists of iron pipes that have been concreted.

As Mr. Orr explained, monuments are permanent markers set by a surveyor to mark a corner on a boundary. Those monuments noted as "found" on his survey map were previously set by other surveyors and then physically located by Mr. Orr or a member of his crew. Mr. Orr and his crew also set other monuments, consisting of 5/8" rebar with an aluminum DEC cap, to mark various points along the boundary lines they determined. These monuments, like the ones he found, are shown on Mr. Orr's survey map. (Orr, transcript: pages 127 - 128.)

The boundary lines themselves were drawn by connecting the points where monuments were found. For each line segment on the survey map, there are two distance measurements in feet, one followed by an "M" (which indicates DEC's measurement) and the other followed by an "R" (which indicates a measurement previously recorded in a deed that DEC reviewed). (Orr, transcript: page 128.)

Each segment's course is recorded on the survey map as a bearing (a direction north or south followed by a degree measure out of 90 degrees, and another direction east or west). For instance, as Mr. Orr explained, the course between points 7 and 8, the relevant boundary for Mr. DeMeo's property, is "south 48 degrees 15 minutes 50 seconds east," and the distance along the course is 774.15 feet (as measured by DEC, and compared to a distance of 774.7 feet, which is the distance recorded in the

State's deed from Leroy Wood). (Orr, transcript: pages 127 - 128.)

To perform its work, DEC's survey team used various reference maps, all as itemized on Exhibit No. 4. In terms of documents marked and received at this hearing, information from Exhibits No. 8 - 13 was incorporated in the map's development.

More particularly, the calls in the 1928 deed to the State from Walter and Beulah Corey (Exhibit No. 8) and a tract map of the Hudson River Regulating District (Exhibit No. 9) were used to find (or "hold") the monuments at points 1, 2, 3 and 4 on the map. Also, the calls in the 1929 deed to the State from Leroy Wood (Exhibit No. 10) and a second Hudson River Regulating District tract map (Exhibit No. 11) were used to find (or "hold") the monuments at points 4, 5, 6, 7 and 8 on the map, as well as mapped point A, where the survey team found rusted half-inch rebar five inches below grade. Finally, information in a 1931 court judgment (Exhibit No. 12) and a third Hudson River Regulating District tract map (Exhibit No. 13) is relevant to the delineation of the line segment between points 8 and 9. (Orr: transcript, pages 129 - 154.)

Measurement Discrepancy

As noted on the survey map, distances along the boundary segments, as derived from the historical record, and distances measured by DEC Staff match well for all segments except for the one between points 8 and 9, where the measurement of 264.4 feet, as shown on some Hudson River Regulating District maps, diverges significantly from DEC's measurement of 255.52 feet. (Orr: transcript, pages 154 - 155.)

To understand this discrepancy, DEC turned to Hudson River Regulating District field books, portions of which were received as Exhibits No. 14 and 15. In the field books, which compile survey information, points 8 and 9 on Mr. Orr's survey map are points "D-56" and "L" respectively, and references to them have been highlighted by Mr. Orr in red pen. In field notes made in 1925 (Exhibit No. 14), the distance between these two points was recorded as 264.38 feet, which Mr. Orr explained was an error that was picked up and corrected in a 1931 field note (included

in Exhibit No. 15) where the distance was recorded as 255.45 feet. (Orr: transcript, pages 159 - 163.)

As noted by Mr. Orr, the correction was documented in the field notes a second time in 1947, where it is written (also in Exhibit No. 15) that the pipes monumenting points "L" and "D-56" were found, and the distance between them measured as 255.45 feet, which is virtually the same as DEC's measurement of 255.52 feet. The same 1947 note states that an unspecified map should be changed from 264.4 feet, to reflect this measurement. (Orr: transcript, pages 161 - 165.)

In 1953, the Hudson River Regulating District consented to the transfer of the relevant State land to the New York State Conservation Department, DEC's predecessor agency, for the purpose of establishing the Northampton campground, as evidenced by a resolution, a copy of which was received as Exhibit No. 16. (Orr: transcript, pages 165 -166.)

The resolution includes a narrative description of the property being transferred, and refers to particular sheets of the Hudson River Regulating District's Sacandaga Reservoir property maps, one of which, Sheet No. 24, was received as Exhibit No. 17. (Orr: transcript, pages 166 - 168.)

In the narrative description on Exhibit No. 16, the 264.4 feet reference for the distance between Mr. Orr's points 8 and 9 remains (as highlighted in yellow on the exhibit). However, on the accompanying map (Exhibit No. 17), as retrieved by Mr. Orr from the Hudson River Regulating District, the distance of 264.4 feet has been crossed out, and 255.5 feet has been written below it, an indication that a map correction occurred, as called for in the 1947 field notes.

The same correction is noted in a letter dated February 19, 1954, from the State Conservation Department to the State Board of Equalization & Assessment, which was received as Exhibit No. 18. The letter, retrieved from DEC's files, advises the board of the land transfer from the Hudson River Regulating District, and includes the same narrative description of the property as is contained in the Hudson River Regulating District's resolution. However, in the letter, the reference to 264.4 feet (in line 12 of the description) is underlined, and in the margin

to the left "255.5'" is written and underlined, with the indication "OK" below it. (Orr: transcript, pages 173 - 175.)

Another letter, dated March 18, 1954, and addressed to the chief engineer of the Hudson River Regulating District, notes the same correction. Received as Exhibit No. 19, the letter states: "Enclosed is a copy of description of lands transferred by the Hudson River Regulating District to the Conservation Department for use as a public campsite in the Town of Northampton, County of Fulton. In line 12 of the description the distance 264.4 feet is incorrect and should be 255.5 feet." (Orr: transcript, pages 175 and 176.)

Finally, a copy of a 1955 order (Exhibit No. 20) which abandoned as a highway that portion of Houseman Street under the Conservation Department's ownership, also incorporates, in its description of the affected property, the measurement of 255.5 feet, which Mr. Orr said relates to the distance between his points 8 and 9. (Orr: transcript, pages 177 - 183.)

As shown on his map, Mr. Orr's survey points 8 and 9 lie along the centerline of Houseman Street, which forms the eastern boundary of Mr. DeMeo's triangular property, and point 8 is the property's southernmost point, referred to in Mr. DeMeo's deed (Exhibit No. 21) as the point at which the centerline intersects the line of lands sold to the State by Leroy Wood. Mr. DeMeo's eastern boundary line is 125 feet, as noted in both the deed and the tax map (received as Exhibit No. 3), meaning it does not extend the full length between points 8 and 9.

Although Mr. Orr measured the distance between points 8 and 9 as 255.52 feet, he said that the Campers Last Stop store would still encroach on State land if point 8 were shifted southward along the Houseman Street centerline to the previously recorded 264.4 feet from point 9, and Mr. DeMeo's western property line were then drawn to that new location from point 7 on the survey map. Mr. Orr said that this redrawing of the western property line would lessen the encroachment, but that the encroachment would not be eliminated. (Orr: transcript, pages 183 - 184 and 215.) On the other hand, it would make the line closer to, and more consistent with, the line created by the existing fence along the back of the store, which is highlighted in pink on Detail "A" of Mr. Orr's survey map. (Orr: transcript, pages 214

and 215.) This fence was observed at the time of Mr. Orr's survey, but Mr. Orr said he did not know how long ago it was installed, or who installed it. (Orr: transcript, page 184.)

Mr. Orr expressed great confidence in the accuracy of his survey map, since it was based on monuments that were called for in deeds and then located in the field. He explained that "finding all the monumentation, all the deeds called for iron pipes being on the corners. And when we found them all, and checking all the angles and distances, it all seemed to fit really well with the timeframe when that was done back in 1925 compared to what we measured today." (Transcript, page 188.)

As acknowledged by Mr. Orr, the only exception concerned the distance between points 8 and 9, which he said required the additional research to explain why there was a significant discrepancy between the measurement made in 1925 and those made in 1931, 1947 and 2000. While the historical record indicates that the 1925 measurement was an error, the field notes of the Hudson River Regulating District do not include a narrative explaining why the error occurred. Mr. Orr reasonably theorized that it resulted from a measurement getting "written down wrong" and then being carried forward until the error was found and corrected. He said that errors like this happen to every surveyor, and that it would not be unusual to find such an error at a time when "hundreds and hundreds" of land parcels were being surveyed at the same time for the Sacandaga Reservoir. (Transcript, page 224.)

Mr. Orr stressed that, in creating his survey map, he followed the State's standards and practices of surveying, creating a work product that "is based on measurements, research, mathematical computation, analysis, and professional judgment consistent with rules of evidence, legal precedents, and in accordance with the applicable laws of New York State," consistent with this definition of "survey" in the land surveying practice guidelines of the State Education Department's Office of the Professions (a copy of which was received as Exhibit No. 22).

Mr. DeMeo informed DEC Staff by letter in 2003 that he had retained a firm to survey his property, specifically to address the alleged encroachment identified by Mr. Orr. However, no

survey was produced then or subsequently on his behalf, nor did Mr. DeMeo testify at the hearing.

Blackstone Testimony

Mr. DeMeo's sole witness was Mr. Blackstone, a licensed land surveyor whom Mr. DeMeo retained in September 2014. Mr. Blackstone testified on direct that, with a copy of Mr. Orr's survey map, he traversed the area in question several times after his retention and located a number of the points that Mr. Orr had previously identified. He said he agreed with the location of the points that Mr. Orr had found and that his "lock-in" with Orr's information was "as tight as you can desire." (Blackstone: transcript, pages 244 and 245.) Under cross-examination, Mr. Blackstone repeated that he had located enough of Mr. Orr's numbered points "to be able to concur with the dimensions and distances and directions" shown on Exhibit No. 4, adding that the exhibit "depicts what is physically on the ground at this time," and is "a true and accurate representation of the points on the ground." (Transcript, pages 350 - 351 and 372 - 373.)

As Mr. Blackstone acknowledged, there is a hierarchy of evidence in land surveying under which monuments are relied on ahead of distances and angles for the purpose of making boundary line determinations. (Transcript, page 252.) This, he said, is consistent with the general rule that, among different calls for the location of land boundaries, the order of preference is (1) natural objects or landmarks, (2) artificial objects or monuments, (3) adjacent boundaries, (4) courses and distances, and (5) quantity. (See 1 NY Jur, Adjoining Landowners, Section 121, a copy of which was marked as Exhibit No. 42; and Pauquette v. Ray, 58 A.D.2d 950, 397 N.Y.S.2d 442, 1977 N.Y. App. Div. LEXIS 13152, a copy of which was marked as Exhibit No. 43.)

Consistent with the aforementioned hierarchy, property lines are depicted on Mr. Orr's survey map as lines drawn from points 1 to 9, each point associated with an existing monument consisting of a concreted iron pipe. However, Mr. Blackstone says these depictions are not definitive to the extent that all the monuments cannot be reconciled with information in the 1925 field notes (Exhibit No. 14), particularly with the measurement of 264.38 feet between D-56 (which is meant to correspond to

point 8) and L (which is meant to correspond to point 9).
(Transcript, pages 370 and 371.)

Given this conflict, Mr. Blackstone said that monumentation had been compromised relative to establishing Mr. DeMeo's property boundaries, and that distances need to be held as the primary evidence instead. (Transcript, pages 401 - 402.) Mr. Blackstone acknowledged the iron pipe at point 8 on Exhibit No. 4, but, in answer to my question, said he differed with Mr. Orr as to whether that represented a corner of Mr. DeMeo's property. (Transcript, page 352.) Mr. Blackstone also challenged whether that pipe represented the location of D-56 when the distance between points D-56 and L was measured in 1925, claiming that point 8 was located as point D-56 for the first time in May of 1931. (Transcript, page 405.)

Mr. Blackstone said that the property line in question, which forms the boundary with the State, could not be established definitively because of "conflicting calls and deeds" and "conflicting identification of points" through the numerous exhibits he had reviewed. (Transcript, pages 404 - 405.) Addressing the discrepancy in measurements between points D-56 and L in the 1925 and 1931 field books, Mr. Blackstone said, "Unless I can come up with evidence that clearly identifies that the 255 [in 1931] makes more sense than the 264 [in 1925], my reaching the threshold of definitive location is compromised . . . [O]bviously a mistake was made, but who made it? Was it the person measuring the 264, or was it the person measuring the 255? . . . I can't throw away 264.4 because someone decides to make a note in a 1931 field book and said they found a point that's 255. I don't buy it." (Transcript, pages 406 and 407.)

To illustrate his arguments, Mr. Blackstone produced two maps on a sheet dated November 21, 2014, and received as Exhibit No. 39. The larger map purports to outline "lands formerly of Leroy Wood" that were not deeded to the State in 1929, and includes a note saying it was developed from azimuth and distance data from the 1925 field notes (Exhibit No. 14), which include the measurement of 264.38 feet between points D-56 and L, rather than the subsequent measurement of 255.52 feet. For the length of Houseman Street, the map also employs azimuth and

distance data from Exhibit No. 11, the map of Tract No. 657 which is referenced in the 1929 deed to the State. (Blackstone: transcript, pages 356 -357 and 385 - 386.)

Mr. Blackstone's map of the Wood property encompasses an area of approximately 13 acres, both parties acknowledged. Mr. Blackstone said he mapped the area to expand the frame of analysis, and to contemplate the impact of the approximately nine-foot difference in measurement between points D-56 and L as it would relate to the shape of the entire 13 acres and the resulting error of closure. (Transcript, page 439.)

As Mr. Blackstone explained, in theory, when you choose a point and go directions and distances around the perimeter of a parcel, you will end up where you started, and the actual difference between where you ended up and where you started quantifies the error of closure. (Transcript, pages 250 - 251.) According to his analysis documented in Exhibit No. 40, the error of closure is 3.35 feet when using 264.38 feet for the distance between points D-56 and L, but 11.56 feet when using 255.45 for the distance between those points. (Transcript, page 257.)

Mr. Blackstone said that, in the context of a survey done 90 years ago using the equipment available at that time, a three-foot error of closure for the 13-acre parcel, whose perimeter is 3,500 feet, should be considered insignificant. (Transcript, pages 251 and 252.) However, as Mr. Orr explained, such error is "kind of large," especially in comparison to the error of closure he calculated for the 49-acre parcel deeded from Mr. Wood to the State in 1929.

In Exhibit No. 44, Mr. Orr presented his own analysis using bearings and distances between points, as recorded in the State's deed (Exhibit No. 10), from which he calculated an error of closure of approximately 0.66 feet. This error, for a parcel with a perimeter of 6,644.6 feet, was "really good" for 1929, said Mr. Orr, and indicated that the State's deed is more accurate than the 13-acre parcel depicted by Mr. Blackstone on his map. (Orr: transcript, pages 460 - 467.)

Mr. Blackstone's map indicates that he "held" two points: D-57 (which corresponds to point 7 on Mr. Orr's survey map, and

is the terminus of the line in dispute) and L (which corresponds to point 9 on Mr. Orr's survey map). He said he authenticated the location of D-57 on the basis of data going back to 1925, and L in relation to pine, cherry and maple trees that were used as ties to identify that point in the years 1929, 1931, 1947 and 2000. (See depictions of point L in Exhibit No. 11, for 1929; Exhibit No. 15, for 1931 and 1947; and Exhibit No. 4, for 2000.) (Transcript, pages 247 - 248, 360 - 361 and 401.)

While Mr. Blackstone said that he held Mr. Orr's points 7 and 9, which are marked by iron pipes, he chose to ignore Mr. Orr's point 8, also marked by an iron pipe, on the basis that its location was inconsistent with point D-56 as measured from point L in the 1925 field notes. (Transcript, pages 249 - 253.) To locate point D-56, Mr. Blackstone created what he described as a "distance-distance intersection" of lines drawn from points D-57 and L, each line drawn to D-56 along the same distance measured to that point in 1925: 264.38 feet for the line between L and D-56, and 774.70 feet for the line between D-57 and D-56.

The intersection of the lines created by this exercise is shown in the bottom-left corner of Exhibit No. 39, which is a map labelled "Southeast Detail." With the point of intersection intended to represent the southernmost extent of Mr. DeMeo's property, the Campers Last Stop store is entirely within what the map calls the "Lands of DeMeo," and there is no encroachment on the lands of the State; the store structure is 3.5 feet away from the boundary at one end, and 0.8 feet away at the other. (Blackstone: transcript, page 261.) Also, Mr. Blackstone explained, the line between points D-57 and D-56 falls right along the old fence line behind the store, which Mr. Blackstone said was "mind-boggling." (Transcript, page 254.)

According to Mr. Blackstone, the fence posts run the vast majority of the distance between D-56 and D-57, and "some parts are better than others, but clearly, this isn't something that was put up without perhaps any attention to detail. But is it a magic coincidence that those two distances and those two fixed monuments create a line running down the fence line? It pretty much was a shock to me that it ended up that way." (Transcript, pages 254 and 255.)

In summary, Mr. Blackstone said that, in comparison to Mr. Orr's survey map, his work, as displayed on Exhibit No. 39, provides "a more comprehensive look and a more consistent logic as it would relate to putting those property lines on the ground." (Transcript, page 260.) He said the setting of monuments in 1931, to some extent inconsistent with the measurements recorded in 1925, created an "area of confusion that's difficult to overcome," and that his reliance on measurements recorded in 1925 provided "the most logical, well-reasoned, mathematically correct" understanding of the property lines. (Transcript, page 260.)

Mr. Blackstone admitted that, by his exercise, he was not creating a definitive depiction of the relevant property line, but claimed that DEC was not providing a definitive answer either, and that a definitive answer was elusive. (Transcript, page 404.) In his closing statement, counsel for Mr. DeMeo argued that, due to the conflicting testimony of the two experts, DEC had not made a "clear and convincing" showing that its survey was correct, and "as the burden of proof does clearly rest on [DEC's] shoulders," the complaint should be dismissed. (Transcript, pages 481 and 482.)

According to DEC's enforcement hearing procedures, DEC Staff does bear the burden of proof on all charges and matters which it affirmatively asserts in the complaint. (6 NYCRR 622.11(b).) However, for the factual matters asserted, that burden must be sustained only by a preponderance of the evidence, unless a higher standard has been established by statute or regulation. (6 NYCRR 622.11(c).)

DEC Staff Meets Burden of Proof

I find that, in this case, DEC has established the accuracy of Mr. Orr's survey by a preponderance of the evidence, and that there is no legal basis for applying the higher standard of clear and convincing evidence, as proposed Mr. DeMeo. Mr. Orr accurately depicts the boundary between the properties of Mr. DeMeo and the State as lying on the line between points 7 and 8 on his map, which are the same points previously identified in the Hudson River Regulating District field notes as D-57 and D-56.

Points 7 and 8 were established on the basis of iron pipes that were found at those locations during Mr. Orr's survey, which the evidence indicates are the same iron pipes referred to in the State's 1929 deed (Exhibit No. 10). In the deed, the pipe at point 8 is identified as being in the centerline of Houseman Street, where it is on Mr. Orr's survey map as well.

As noted in the 1931 field notes, the pipe at D-56 (which corresponds to point 8) was found when the survey crew was concreting on May 28 of that year, a fact Mr. Blackstone conceded during his cross-examination. (Transcript, pages 362 - 366.) The notes also indicate that, with their instruments set at point L (which corresponds to point 9), the surveyors that year measured the distance to D-56 as 255.45 feet. (Blackstone: transcript, page 366.) On April 30, 1947, the distance between the pipes at point L and D-56 was again measured to be 255.45 feet, as also recorded in the field notes. Finally, in the survey culminating in the 2002 map, the distance between these pipes was measured as 255.52 feet.

As Mr. Blackstone emphasized, all these measurements are virtually the same, but significantly different from the 264.38 feet recorded as the distance between D-56 and L in the 1925 field notes. (Blackstone: transcript, page 366.) Under the circumstances, Mr. Orr's explanation for this discrepancy - that the 1925 distance was due to a measurement error - is the most reasonable one available. Mr. Blackstone's hypothesis - that the location of D-56 shifted between 1925 and 1931 - is not supported by any information in the record.

As Mr. Blackstone acknowledged during cross-examination, there is no indication in the 1931 field notes that the monuments at points L or D-56 had been moved in any way to achieve the distance of 255.45 feet. (Transcript, page 367.) Not only was there an existing pipe to locate D-56 in 1931, the survey crew that year used tree ties to confirm the location of L, Mr. Blackstone conceded. (Transcript, page 368.) Furthermore, for D-56, ties to cherry trees are virtually the same in the 1925 and 1931 field notes, which indicates that the location of that point did not vary between the two surveys, as was brought out during Mr. Blackstone's cross-examination. (Transcript, pages 412 - 416.)

According to the 1931 field notes, the survey crew poured concrete around the pipe they found at D-56, and set a pipe at point L and poured concrete around it as well. (Blackstone: transcript, page 365.) The locations of these points were then confirmed again twice - in 1947 and 2000 - with no indication that the pipes had been moved or relocated in any way, Mr. Blackstone conceded. (Transcript, page 369.)

On Exhibit No. 39, Mr. Blackstone locates D-56 in his map intended to depict the "lands formerly of Leroy W. Wood," which he said was developed from azimuth data in the 1925 field notes. (Transcript, pages 385 and 386.) In that map, he said, the internal angle at D-56, representing the convergence of the lines to that point from held points D-57 and L, was calculated to be 39 degrees, 33 minutes, which he said was not significantly different from Mr. Orr's measured angle at D-56 of 39 degrees, 36 minutes and 50 seconds, or his recorded angle of 39 degrees, 35 minutes, both as documented in "Detail A" of his survey map (Exhibit No. 4.) (Transcript, page 383.)

On the other hand, in his map depicting "Lands of DeMeo," also on Exhibit No. 39, Mr. Blackstone shows an internal angle of 40 degrees, 43 minutes and 30 seconds, where the same two lines converge. This angle differs from the angle calculated for his other map, and confirms that the two maps do not conform to each other. As Mr. Blackstone conceded, the lines shown in his second map are separate from those in his first, having been created by a distance-distance intersection from points D-57 and L, as noted on Exhibit No. 39. (Transcript, pages 393 - 395.) Explaining the difference between the maps, Mr. Blackstone said that, for the map showing Mr. DeMeo's property, including the structures it contains, distances, as recorded in the 1925 field notes, "are held as a heavier weight of evidentiary proof," and angles, as determined from those notes, "are subservient to distances." (Transcript, pages 384 and 385.)

Mr. Blackstone explained that on his map of "lands formerly of Leroy W. Wood," D-56 is located, generally speaking, along the center line of Houseman Street, which is consistent with its location on a map included in the 1925 field notes, as well as the location of the iron pipe referred to in the State's deed. (Transcript, pages 391 - 392.) However, on his map titled

"Lands of DeMeo," D-56 is not identified as such; instead, the two lines converge on a point well away from the street's centerline and, in particular, well away from the point on that centerline shown as point 8 on Mr. Orr's survey map, which Mr. Blackstone indicates by a cross highlighted at the hearing with yellow marker. (Transcript, pages 398 - 399.) Applying the map's scale of "one inch equals 30 feet," Mr. Blackstone's point of convergence is about 15 feet from Mr. Orr's point 8.

Mr. Blackstone acknowledged that, on his map of the lands of DeMeo, there is no monument at the point where the two lines converge, and that the only evidence supporting the establishment of a monument at that point is the measured distance of 264.4 feet between points D-56 and L in 1925. (Transcript, page 400.) Furthermore, he said he would not place a monument at the point of convergence, because he did not believe that his map created a "definitive" location of property lines. (Transcript, page 403.) Finally, he acknowledged that his map was not based on information in Mr. DeMeo's own deed, and that he had not done a boundary line survey of Mr. DeMeo's property. (Transcript, pages 393 and 394.)

Mr. Blackstone acknowledged that, on his map of the lands of DeMeo, his line running 264.38 feet from point L does not follow the centerline of Houseman Street. (Transcript, page 398.) This presents a conflict with Mr. DeMeo's deed (Exhibit No. 21), where the Houseman Street centerline is identified as a property boundary, and with a map included in the 1925 field notes, where Houseman Street is depicted as running in a straight line from point D-56 to L and beyond, as it does on Mr. Orr's survey map. (Transcript, pages 456 - 459.)

Mr. Blackstone's other line, running 774.70 feet from point D-57, "falls right along" the old fence line that runs behind the Campers Last Stop store, Mr. Blackstone testified. (Transcript, page 254.) While Mr. Blackstone found this remarkable, there is no evidence as to who erected the fence, and why it was erected where it is. Christopher Schlegel, Mr. DeMeo's neighbor, described the fence as "an old, dilapidated 6-by-6 metal fence with pine posts" that had been there "probably since Moses," and "at least as long as I've been alive. That's 46 years." (Transcript, pages 305 and 306.)

Mr. Schlegel said that where the fencing, which runs behind his property as well, was erected originally "was totally wrong," and that, having grown up on Houseman Street, "it's always been common knowledge" that the Campers Last Stop store, in which Mr. Schlegel worked as a teenager, "was on State land and this end of the street needed some serious surveying done." (Transcript, pages 298 -306.) Mr. Schlegel said that since he was a kid, the store, which he estimated was built about 50 years ago, "has always been 8-foot on State land," and that "everybody on Houseman Street knows that." (Transcript, pages 304 and 307.) He added, "If you go in the store and if you're in the bathroom of the store or you're in the kitchen of the store, you're on State land." (Transcript, page 305.)

In summary, there is nothing in the record to support or corroborate the property lines drawn by Mr. Blackstone, whereas Mr. Orr's survey map is supported by monumentation that he and his survey team located in the field, including iron pipes that are referenced in the State's 1929 deed. Mr. Orr's survey map is also broadly consistent with distance and azimuth information in the historical record, while Mr. Blackstone's interpretation of Mr. DeMeo's property lines relies heavily on a distance measurement from 1925 that was long ago corrected because, during subsequent surveys, it was determined to be erroneous.

As Mr. Orr explained, the fact that the internal angles he measured at points 7 and 8 correspond so well to the record angles at those locations tends to support the accuracy of his survey map's depiction of the relevant boundary line. He said that if point 8 (associated with D-56) were extended to a distance of 264.4 feet from point 9, consistent with the 1925 data, the angles at these points would not check. (Transcript, pages 211 - 212.) Also, he said that if the measurement of 264.4 feet were correct, it would more likely affect the placement of point 9 on his map, not point 8, because of how well point 8 checks with monumentation to the south, including point A. (Transcript, page 222 - 223.) In other words, point 9 would be shifted farther north, which would have no impact on Mr. DeMeo's boundary line. (Transcript, page 222.)

Use and Maintenance of Store

Although Mr. DeMeo did not testify, his use and maintenance of the Campers Last Stop store was not contested at the hearing. The record includes the deed under which Mr. DeMeo acquired the store property in 1996 (Exhibit No. 21), as well as the testimony of a next door neighbor, Mr. Schlegel, and the Town's code enforcement officer, Mr. Ginter, about Mr. DeMeo's activities there.

Mr. Schlegel said that, in the period since Mr. DeMeo purchased the store property, he has added a pavilion to the store, as well as three enclosures: two on the front of the store, and one on the back that is completely on State land. (Transcript, page 304.) Mr. Schlegel added that, during the same period, Mr. DeMeo has also built a storage building that encroaches on State land. (The storage building is shown in a photograph taken from Mr. Schlegel's property (Exhibit No. 38) and a drawing Mr. Schlegel made at the hearing (Exhibit No. 38-A).) (Schlegel: transcript, page 302.)

Mr. Schlegel purchased his property from Mr. DeMeo in 2010, as evidenced by a deed (received as Exhibit No. 36) between Serenity Now, LLC (which is owned by Mr. DeMeo) and Northampton Beach Properties, LLC (which is owned by Mr. Schlegel). (Schlegel: transcript, pages 271 - 272 and 279 - 284. See also Exhibit No. 35, entity information for Northampton Beach Properties, LLC, as maintained by the New York State Department of State.)

Mr. Schlegel acknowledged that he and Mr. DeMeo have a contentious relationship that has been punctuated by heated disagreements about activities along their shared property boundary, especially in the area of an easement referenced in the deed between them. (Transcript, pages 272 and 314 - 327.) Mr. Schlegel has also made various complaints about Mr. DeMeo to town officials, including allegations that Mr. DeMeo did construction work on his property without the requisite building permits. (Schlegel: transcript, page 307.) On September 12, 2012, Mr. Schlegel wrote Mr. Ginter a letter (received as Exhibit No. 25) in which he claimed that the store was a public safety hazard due to a sagging ridge line above where bearing

walls had allegedly been removed. (Ginter: transcript, pages 42 - 44 and 75 - 76.)

Mr. Ginter testified that, despite a diligent search of records in his custody, he could find no records of the town having issued Mr. DeMeo building permits to expand or make structural improvements to the Campers Last Stop store, at least for the period since 2002. (Transcript, pages 71 - 72.) On September 24, 2012, Mr. Ginter notified Mr. DeMeo by letter (Exhibit No. 26) that he had no building permits on file or any records of inspections for alterations and modifications that had been made at the store, and that he was requesting a site visit "to review possible safety issues, code violations and an overall property inspection." (Ginter: transcript, pages 44 - 45.) At Mr. DeMeo's suggestion, and because the store was due to close soon for the season, Mr. Ginter later agreed to defer the visit to the following spring. (Ginter: transcript, pages 45 - 46.)

By letter of May 20, 2013 (Exhibit No. 27), Mr. Ginter advised Mr. DeMeo that the store had been posted as not to be occupied due to public safety concerns, in the absence of a fire and structural inspection that Mr. DeMeo had not yet scheduled. That same day, apparently in response to the letter, the fire inspection was held, revealing various violations, as documented in Ginter's report attached to Exhibit No. 28, which is a letter, dated August 9, 2013, from Mr. DeMeo informing the town board about corrective action he had taken.

According to Mr. Ginter, Mr. DeMeo bought a fire extinguisher and installed a hood over the deep fryer, both as requested in the inspection report. (Transcript, page 86.) However, because he had not installed a fire suppression system over the deep fryer, the fryer was ordered taken out of service on June 4, 2014, as confirmed in a notice (Exhibit No. 33) that Mr. Ginter issued. (Ginter: transcript, pages 67 - 71.)

At the hearing, Mr. Ginter testified that he had no information that the fire suppression system had been installed, though a company's proposal to do so, with cost information, had been provided to Mr. DeMeo and forwarded to Ginter in the correspondence received as Exhibit No. 28. (Transcript, pages 53 and 87 - 88.) Based on Mr. Ginter's most recent inspection

of the store, the absence of the system over the deep fryer was the only matter concerning compliance with the fire code, and Mr. Ginter said that he had no information that the fryer was being used in violation of his order that it be kept out of service. (Transcript, pages 87 - 88.)

Addressing Mr. Schlegel's complaint about a sagging ridge line, Mr. Ginter testified that the store roof does sag, which he attributed to the age of the building. He said that, at Mr. DeMeo's invitation, he had climbed onto the roof himself and stomped around on it, concluding it was obvious that the roof was rather sound and that despite whatever had caused the sag, the building had not been compromised to the point where it would cave in. (Ginter: transcript, pages 76 - 77.)

Mr. Ginter testified that Mr. DeMeo received a town permit to put a new roof and siding on a storage building that is separate from the store but also at the 324 Houseman Street property. According to the original permit application (received as Exhibit No. 31), the permit was sought for the reroofing of a building whose existing roof had collapsed, and the approval was granted in 2008 subject to a schedule of inspections (received as Exhibit No. 32). (Ginter: transcript, pages 61 - 67.) Mr. DeMeo requested renewal of the permit in October 2012, according to an application received as Exhibit No. 30. (Ginter: transcript, pages 57 - 59). The permit, for the new roof and siding, was subsequently renewed on November 14, 2013, as documented in Exhibit No. 29. (Ginter: transcript, pages 54 - 57.)

According to Mr. Ginter, the storage building is north of the store, to the right of the store if one is looking into the property from Houseman Street. (Transcript, pages 56 - 57.) According to Exhibit No. 30, the building is 42 feet wide, 28 feet long, and 14 feet high. At the hearing, Mr. Ginter said the building had a new roof, consistent with the plan intended by the permit application. (Transcript, page 61.)

As part of his testimony, Mr. Schlegel identified a photograph (Exhibit No. 38) taken from his property in early December 2014, which he said shows the fence line between his and Mr. DeMeo's properties, on the other side of which is Mr. DeMeo's storage building and an adjacent shed. (Transcript,

pages 284 - 293.) Mr. Schlegel testified that the storage building, in which bicycles are kept, was put up after Mr. DeMeo bought the store property, that the roof of the building collapsed a few years ago, and that when Mr. DeMeo applied to the town for a roof replacement permit, he failed to mention an eight-foot extension of the building's back side that was accomplished in conjunction with that work. (Transcript, pages 290 - 293 and 304.) Mr. Schlegel said that, with the extension, the back left-hand corner of the storage building now extends 18 inches over Mr. DeMeo's property line with the State. (Transcript, pages 293 and 302.)

Mr. Schlegel depicted this alleged encroachment on the sketch he made at the hearing, which was received as Exhibit No. 38-A. That sketch also depicts a shed whose roof, Mr. Schlegel said, hangs over State land, though the footprint does not. (Transcript, pages 287 - 289.) Finally, the sketch depicts the location of a septic tank cap at the back left-hand corner of the store structure; the cap, Mr. Schlegel said, is also on State land. (Transcript, page 308.)

The possibility of encroachments on State land in addition to the store structure itself - - such as a septic tank and other infrastructure serving the store, and separate structures such as the storage building and shed - - led DEC Staff to request an amendment of its complaint to have all such encroachments made part of its case and encompassed within the relief it demanded. Because the request was made orally at the hearing's outset, before testimony was taken, I granted it, finding it would be expedient to address all potential encroachments from Mr. DeMeo's property in one proceeding, rather than in piecemeal fashion. (See pages 23 - 34 of the transcript for the discussion of this amendment of the complaint.)

Mr. Orr's testimony was limited to the encroachment caused by the store structure, and Mr. Schlegel was the only witness to testify about other potential encroachments. On the issue of the septic tank cap, Mr. Schlegel said he was personally aware of the cap's location because, when he was a teenager working at the store, the septic system got clogged and he had to dig the cap up so the tank could be pumped out. (Transcript, pages 307 -

308.) It is unclear whether the cap remains where it was at that time, because many years have since passed and Mr. Schlegel himself conceded the possibility that a new septic system has been installed. (Transcript, page 308.)

Regarding the storage building and shed, Mr. Schlegel, who is not a surveyor, did not explain exactly how he determined their alleged encroachments on State land, which means his claims cannot be substantiated. He alluded to months of property line research he said he had done with Mr. Orr and his own surveyor, Zareh Altounian, just prior to the purchase of his property from Mr. DeMeo in 2010 (transcript, page 303). However, Mr. Orr did not mention ever speaking to Mr. Schlegel, and Mr. Altounian, though subpoenaed as a witness for DEC Staff, did not appear at the hearing. Finally, the storage building and shed do not appear on Mr. Orr's survey map (Exhibit No. 4), presumably because Mr. DeMeo built them after Orr's survey was completed in 2002.

Not only does the record lack evidence corroborating Mr. Schlegel's claims, Mr. Schlegel himself did not appear to be an entirely unbiased, disinterested witness. He acknowledged his own at times heated property disputes with Mr. DeMeo, and conceded that these disputes and the bad blood between the two men had a role, albeit slight, in his appearance at Mr. DeMeo's hearing. (Transcript, page 322.) As a person living next to the Campers Last Stop store, Mr. Schlegel might also benefit from the store's closure and the removal of structures like the storage building and shed, which are close to his own property line, whether or not they encroach on State property.

In summary, while Mr. Orr's survey work convincingly establishes the boundary line between the properties of Mr. DeMeo and the State, as well as the significant encroachment of the store structure on State land, the hearing record is not adequately developed to draw conclusions about the existence and extent of other encroachments from Mr. DeMeo's property. In 2002, at the end of their survey, Mr. Orr and his team set rebar (as shown in Detail "A" of Exhibit No. 4) to mark the State boundary line on both sides of Mr. DeMeo's store; however, Mr. Orr said he had not returned to that area since to do any more survey work (transcript, pages 116 and 117). To verify other

possible encroachments, Mr. Orr needs to go back to the site and extend the line on the ground in both directions, which can be done in the context of ensuring that the store's encroachment is eliminated.

Requested Relief

DEC Staff requests that the Commissioner impose a \$100 civil penalty and order Mr. DeMeo to remove any portion of the Campers Last Stop store or other structure that encroaches on State land. DEC Staff also requests that Mr. DeMeo post a performance bond in an amount adequate to address the costs of removing all encroachments that exist, should he fail to remove the encroachments himself within 90 days of a Commissioner's order.

According ECL 9-0303(2), no building shall be erected, used or maintained upon State lands except under permits from DEC. Although DEC issues temporary revocable permits for the use of State lands, the record lacks evidence that such a permit was granted in this case.

In fact, the record includes an affidavit of Peter Frank, chief of the Bureau of Forest Preserve Management in DEC's Division of Lands and Forests, who oversees Staff that receive, review and process applications for such permits. According to that affidavit (Exhibit No. 23), on October 8, 2014, DEC Staff under Mr. Frank's direct supervision diligently searched for, but could not find, any record that DEC had issued a temporary revocable permit to Mr. DeMeo or Campers Last Stop store, at least since the year 2000. That is not surprising given the purpose of such permits, which is to authorize the temporary use of State lands. According to the DEC policy governing such permits (ONR-3, last revised May 26, 2011), they will not be issued for any "construction or installation of permanent facilities such as roads, bridges, trails, structures, towers or utility lines not authorized by law, deeded right or easement."

Not only did DEC Staff demonstrate that no permit exists authorizing the store's encroachment on State land, Mr. DeMeo offered no evidence that such a permit, or other authorization, exists. This was consistent with his defense, which did not

concede any encroachment and disputed DEC Staff's finding to the contrary.

Pursuant to ECL 9-0303(6), DEC may dispose of any improvements upon State lands under such conditions as it deems to be in the public interest. However, in this case, DEC proposes that Mr. DeMeo himself remove any portion of the store or other structure that encroaches on the State lands, which consist of "forest preserve," as defined by ECL 9-0101(6).

This authority to require Mr. DeMeo, as respondent, to remove improvements from the forest preserve emanates from both ECL 9-0303(6) and ECL 9-0105, which states that for the purpose of carrying out the provisions of ECL Article 9, DEC "shall have the power, duty and authority to: (1) Exercise care, custody and control of the several preserves, parks and other historic lands described in this article." Such authority has been confirmed in prior Commissioner's orders, including Matter of Eugene F. Bartell (October 14, 2010) and Matter of Walter W. French (July 20, 2007). In Bartell, the Commissioner adopted the underlying ALJ's report which dismissed as without merit the respondent's argument that the Commissioner lacked authority to impose injunctive relief to address the respondent's violations, which included the maintenance of a staircase, dock and bench on State land without authorization, in violation of ECL 9-0303(2). In his ruling, the ALJ cited ECL 9-0105 and ECL 9-0303(6) in finding that the Commissioner had the authority to order the respondent to remove these unauthorized improvements from the State forest preserve.

In this case, requiring that structures be removed by Mr. DeMeo, rather than by the State, is especially appropriate given evidence that they straddle the State's property line, and to the extent such structures may still be preserved, if only partially, once encroachments are eliminated. For instance, the store itself, while it encroaches on State land, appears to be mostly on Mr. DeMeo's own property, according to Mr. Orr's survey map. It is unclear whether, by law and as a practical matter, it could remain without the encroachment, but that is something Mr. DeMeo should be allowed an opportunity to explore before the encroachment is removed. Mr. Ginter did not rule out the possibility that the store might lawfully continue,

explaining that if Mr. DeMeo were ordered to remove the portion of the store that encroaches on State land, the town would not require him to comply with its 15-foot rear setback requirement. (See discussion at transcript pages 72 - 74.)

Were the State to remove the encroachment itself, it could not avoid impacting the portion of the store on Mr. DeMeo's property, which is why it is preferable that the removal be accomplished according to a plan submitted by Mr. DeMeo and approved by DEC, after a full delineation of the boundary by Mr. Orr. The Commissioner's Decision and Order in French provides a precedent for requiring such a plan describing the procedures to be employed in removing a structure (in that case, a floating camp) from the land and waters of the State. In French, the order said that the respondent's failure to submit an approvable removal plan, to remove the structure in accordance with the plan as approved by DEC Staff, or to meet the set time frames for accomplishing those things would be deemed grounds for DEC to remove the structure itself and to assert any other existing rights of recovery against the respondent for the costs and expenses of removal.

In this case, DEC Staff proposes that Mr. DeMeo be required to post a performance bond in an amount adequate to cover the costs of removing any encroachments on State land which are determined to exist. According to Mr. Huyck, DEC Region 5 enforcement coordinator, Mr. DeMeo cannot be relied on to comply with a Commissioner's order, and a financial assurance instrument such as a performance bond or irrevocable letter of credit would allow DEC to pay a contractor to remove DeMeo's property from State land in the event he fails to do so himself. (See Huyck affidavit, Exhibit No. 24, paragraph 15.)

Mr. Huyck says that a request for financial assurance is not unreasonable, and that there is precedent for such a request in two consent orders that resolved Matter of Ryan et al. (Case No. C05-20090701-46), copies of which are attached to his affidavit. In those consent orders, the respondents were obliged to remove structures they owned and maintained on State lands, and to procure and maintain performance bonds to ensure Staff's ability to do the work itself if they did not. Because the consent orders resulted from agreements between the

respondents and DEC Staff, they do not provide legal authority for requiring a performance bond here, where the parties have not reached a settlement and the authority to require a bond is disputed.

In my letter of January 26, 2015, I requested that DEC Staff counsel provide a written explanation of DEC's authority, statutory or otherwise, to require a performance bond in this matter, should the Commissioner find a violation of ECL 9-0303(2) and 6 NYCRR 190.8(w). I also requested that Mr. DeMeo's counsel provide a response to any submission that was provided by DEC Staff.

In its memorandum of February 4, 2015, DEC Staff acknowledges that ECL Article 9, its corresponding regulations at 6 NYCRR 190, and ECL Article 71 do not expressly grant the Commissioner authority to require a respondent to post a performance bond after finding violations of those same provisions. However, DEC Staff argues that such authority is implied by DEC's "broad powers to protect State lands under its jurisdiction," as referred to in Matter of Ryan, et al. (Ruling of the Chief ALJ on Motion to Dismiss for Lack of Subject Matter Jurisdiction, October 25, 2010). These powers, conveyed by the Legislature, were cited by the Chief ALJ as authority for DEC to enforce the provisions of ECL Article 9 through its own administrative hearings, as it has done here, rather than rely exclusively on common law trespass and ejection actions available through the courts. However, the ALJ's ruling did not address DEC's authority to require a performance bond, and while the respondents were ultimately obliged to post such bonds, it was pursuant to consent orders they agreed to in settlement of DEC's charges.

In its memorandum, DEC Staff points out that the Legislature granted the Commissioner authority to require performance bonds as part of issuing permits under the Mined Land Reclamation Law (ECL 23-2715) and under ECL Article 27 as part of operating landfills located in Nassau and Suffolk counties (ECL 27-0704[5][a]). DEC Staff also notes that, under ECL 15-0507(1), financial security may also be required of owners of regulated dams.

Because the power to require a performance bond is not specified among the means available to DEC by which to enforce ECL Article 9, Mr. DeMeo argues that DEC lacks power to impose on him the requirement of a performance bond should it find that a violation has occurred. On the other hand, DEC Staff maintains that, even in the absence of an express grant of authority, it has considerable latitude to fashion a reasonable remedy that is appropriate for a given situation.

In this regard, DEC Staff cites the Commissioner's Order, dated February 22, 1984, in Matter of William Kehoe and Glenn Webb, which involved alleged violations of ECL 15-0501. In that case, the respondents were charged with disturbing and modifying the bed and banks of a stream without first having obtained a DEC permit. Pursuant to a stipulation with DEC Staff, one of the respondents agreed to undertake a restoration plan, and the Commissioner's order directed him to post a performance bond or a surety acceptable to DEC, in the sum of \$20,000, to guarantee fulfillment and completion of the plan's terms.

DEC Staff points out that the requirement of the performance bond, which was not part of the restoration plan, was included in the Commissioner's order despite the fact that Title 5 of ECL Article 15, under which the violations were charged, and the regulations under which that law is implemented (6 NYCRR Part 608) do not expressly authorize such a requirement as part of the remediation of unpermitted disturbances to regulated stream beds or banks. Following the example set in this matter, DEC Staff says the Commissioner may require Mr. DeMeo to post an appropriate performance bond even though ECL Article 9 does not expressly grant such authority.

In his brief, dated February 11, 2015, counsel for Mr. DeMeo dismisses the order in Kehoe and Webb as "a 30 year old aberration" that was wrongly decided and lacks precedential value. Furthermore, he points out that DEC Staff cites no other determinations - either before or since - holding that the Commissioner has the power to require a performance bond in the absence of express statutory authority.

As Mr. DeMeo argues, the Commissioner's order in Kehoe and Webb does not recite any authority in statute, regulation or other DEC determinations in support of his authority to require

a performance bond or surety. Also, nothing in the order indicates that the respondent who was ordered to post the bond opposed that requirement; in fact, the requirement was "to guarantee fulfillment and completion of the terms of a restoration plan" to which the respondent stipulated at the hearing.

Because the order in Kehoe and Webb does not explain the legal basis for the performance bond, and because the order stemmed from a violation of ECL Article 15, it is not authority for requiring a performance bond in this matter, which concerns a violation of ECL Article 9. Staff concedes that, in this case, no express statutory or regulatory authority exists for a performance bond, and I find that none can be implied merely from DEC's broad authority to protect State lands under its jurisdiction.

Furthermore, in other enforcement orders, performance bond requirements have been or can be explained within the context of permits held by the respondents. For example, in Matter of Pedone (Order of the Commissioner, March 5, 1993), the Commissioner asserted his authority to require a performance bond for work required under a consent order to close a permitted, but subsequently abandoned, solid waste landfill. The assigned ALJ had found that DEC's authority to require a bond had not been established; however, the Commissioner said the bonding requirement, sought by DEC Staff, was consistent with a financial assurance requirement for permitted solid waste management facilities (6 NYCRR 360-1.12), and merely updated that requirement in light of the modification of the respondent's obligations which occurred subsequent to permit issuance. Also, in Matter of Steck and Philbin (Order of the Commissioner, March 29, 1993), the Commissioner granted DEC Staff's request for a performance bond reflecting the respondents' costs of removing illegally deposited wood wastes from the site of a permitted sand and gravel mine. Although the authority for the bond is not recited in the order, ECL 23-2715 requires that applicants for mining permits furnish financial security to ensure the performance of site reclamation.

Finally, DEC Staff has not adequately justified why a performance bond should be required in this instance, given that

in similar matters like French and Bartell, none was sought to ensure the removal of illegal structures. In this matter, DEC Staff says that it cannot rely on Mr. DeMeo to follow through on a Commissioner's order, and that his failure to remove unpermitted structures and improvements that encroach on the forest preserve may be anticipated, meaning that, in the absence of a bond, the cost of removal will be shifted to State taxpayers. The exact basis for Staff's concern is not identified, but in his affidavit Mr. Huyck says it became clear to him that Mr. DeMeo had no intention of cooperating with DEC, having failed to respond to Staff's letters in a timely manner, and having failed to present a survey of his own despite a written assurance in 2003 that a surveyor had been obtained.

While the record does indicate Mr. DeMeo's failure to work cooperatively with DEC Staff, it must also be noted that he was under no obligation to do so, and that DEC Staff did not initiate this enforcement action until 2014, more than a decade after DEC Staff became aware of the store's alleged encroachment on the basis of Mr. Orr's survey. Once charged, Mr. DeMeo acted responsibly in filing an answer, retaining an attorney and exploring settlement options, even though settlement could not be achieved. Based on Mr. DeMeo's conduct to date, I do not conclude that he is especially unlikely to comply with the provisions of a Commissioner's order requiring the removal of encroachments and the restoration of affected land.

Even if encroachments are found to exist, Mr. DeMeo argues that no viable reason exists for ordering their removal, since DEC does not allege that it needs the impacted property for improvements or some other benefit to the people of the State. On the other hand, because the impacted property is forest preserve, no improvements are anticipated, and the removal of encroachments is, by itself, a legitimate State interest.

Mr. DeMeo also argues that the cost of removing any encroachment would be exorbitant, but provides no evidence on this point. (In fact, DEC Staff did not set an amount for the performance bond it requested, saying this would have to be determined by a contractor or consultant after the order's issuance.)

Finally, Mr. DeMeo argues that removing any encroachment would effectively destroy his seasonal business, which benefits the users of the Northampton Beach campground. Undoubtedly the store provides a convenience to campground users, given its location close to the campground entrance. However, it is unclear that removing the encroachment would entail the store's demise, since most of the store is on Mr. DeMeo's own property.

Despite the store's encroachment on State property, DEC Staff could have continued to acquiesce to the existing situation. However, having exercised its discretion to prosecute in this matter, the encroachment cannot remain unless it is permitted by some formal mechanism. As discussed above, the store, as a structure, is not eligible for a temporary revocable permit, and Mr. DeMeo has not identified any other permit or license that would allow for its encroachment on State property. Therefore, because an encroachment has been found, it must be removed.

Civil Penalty

Apart from the removal of encroachments and the restoration of impacted State lands, DEC Staff requests a civil penalty of \$100 for violation of ECL 9-0303(2) and 6 NYCRR 190.8(w). This amount is warranted pursuant to ECL 71-0703(1), which provides that, with an exception not relevant here, any person who violates any provision of ECL Article 9 or the regulations promulgated pursuant thereto "shall be liable to a civil penalty of not less than ten nor more than one hundred dollars."

Because the \$100 penalty requested in this matter, which is the maximum for one violation, is so small, DEC Staff did not offer any particular arguments for it in either its opening or closing statements. I find that the \$100 penalty is amply justified because the store's encroachment on State land is inconsistent with that land's protection, which is the stated goal of ECL 9-0303. I recognize that Mr. DeMeo did not erect the store; however, like the person from whom he bought it, he has over a long period of time enjoyed the use of State property as, essentially, an extension of his own parcel. Although Mr. Schlegel testified it was "common knowledge" on Houseman Street that the store encroaches on State land, the record lacks specific evidence that Mr. DeMeo was aware of that fact when he

acquired his property in 1996. Even so, the violations charged are strict liability in nature; the absence of culpability bears only on the penalty that is proposed, which in this case is negligible.

In summary, the penalty requested by DEC Staff is warranted and should be assessed.

CONCLUSION

Since 1996, the respondent, Mark A. DeMeo, has used and maintained a portion of the Campers Last Stop store on State land in the Town of Northampton, Fulton County, without a permit or other authorization from DEC, in violation of ECL 9-0303(2) and 6 NYCRR 190.8(w).

RECOMMENDATIONS

The portion of the store now encroaching on State land, and all other encroachments from Mr. DeMeo's property, should be removed pursuant to a DEC-approved plan submitted by Mr. DeMeo or, if this is not accomplished in a timely manner, by DEC Staff on its own initiative.

Mr. DeMeo should have the opportunity to submit a removal plan after a site visit during which DEC Staff confirms on the ground the boundary line between the properties of Mr. DeMeo and the State, as depicted on Mr. Orr's survey map.

The visit shall determine which, if any, other structures on Mr. DeMeo's property, and what infrastructure associated with Mr. DeMeo's use of his property, also encroach on State land, so that these encroachments are removed in conjunction with the encroachment created by the store structure.

Any removal of encroachments performed by Mr. DeMeo should be done in a manner that restores the State land to a natural, undisturbed condition. As requested by DEC Staff in its complaint, this should include filling holes and other areas of excavation, burying boulders, grading to create a uniform and

smooth soil surface, applying an adequate layer of topsoil, seeding with appropriate seed mix, and applying mulch.

Any plan submitted by Mr. DeMeo should establish procedures to be used for the removal of encroachments, and timeframes for completion of each activity. No plan should be implemented without DEC Staff's approval.

If no plan is submitted and approved by DEC Staff, or if an approved plan is not implemented consistent with timeframes established in the plan, DEC Staff should be empowered to exercise the agency's authority under ECL 9-0303(6) to dispose of any improvements upon State land under such conditions as it deems to be in the public interest, and to seek reimbursement from Mr. DeMeo for the costs involved.

For violation of ECL 9-0303(2) and 6 NYCRR 190.8(w), Mr. DeMeo should be assessed a civil penalty of \$100, as requested by DEC Staff.

EXHIBIT LIST

MARK A. DEMEO (DEC Case No. R5-20121206-2042)

Administrative Law Judge's Exhibits

- A DEC Notice of Hearing and Complaint (1/21/14)
- B Affidavit of Mail Service of Notice of Hearing and Complaint (1/22/14)
- C Affidavit of Personal Service of Notice of Hearing and Complaint (1/29/14)
- D Answer of Mark A. DeMeo (2/20/14)
- E Statement of Readiness for Adjudicatory Hearing (6/4/14)
- F Affidavit of Mail Service of Statement of Readiness for Adjudicatory Hearing (6/5/14)
- G Affidavit of Personal Service of Statement of Readiness for Adjudicatory Hearing (6/20/14)
- H DEC Staff cover letter for transmittal of Statement of Readiness to Chief ALJ James T. McClymonds (7/2/14)
- I Case Assignment Letter of Chief ALJ James T. McClymonds (7/16/14)
- J ALJ Edward Buhrmaster's Notice of Hearing (7/23/14)
- K Notice of Hearing Distribution List (7/23/14)
- L Transcript of 7/30/14 Hearing Date
- M DEC Staff letter requesting hearing rescheduling (9/18/14)
- N ALJ Edward Buhrmaster's Notice of Hearing Rescheduling (9/23/14)
- O ALJ Edward Buhrmaster's Notice of Hearing Rescheduling (10/17/14)

Parties' Exhibits

- 1 Portion of Adirondack Park map, with highlighting of site of Campers Last Stop store in Town of Northampton, Fulton County
- 2 Map of Northampton Beach Public Campground & Day Use Area, with highlighting of site of Campers Last Stop Store
- 3 Portion of Fulton County tax map, with highlighting of DeMeo property (Lot No. 29) and State boundary lines
- 3-A Copy of field book of DEC surveyor Scott Orr, used for survey of Northampton Campground
- 4 Scott Orr's map prepared from survey of Northampton Campground conducted between 2000 and 2002 (4/7/02)
- 5 Scott Orr's photograph of Campers Last Stop store, as seen looking southwest from Houseman Street
- 6 Scott Orr's photograph of Campers Last Stop store, with depiction of boundary between DeMeo property and State land
- 7 Scott Orr's photograph of DeMeo property, as seen from adjacent State land
- 8 Deed to the State of New York from Walter and Beulah Corey (10/11/28) conveying Tract 655 on the maps of the proposed Sacandaga Reservoir, as certified by Fulton County Clerk's Office
- 9 Sketch of Tract No. 655 of Sacandaga Reservoir, prepared for Hudson River Regulating District (2/28/28) and maintained by DEC
- 10 Deed to the State of New York from Leroy W. Wood (5/24/29) conveying Tract No. 657 on the maps of the proposed Sacandaga Reservoir, as certified by the Fulton County Clerk's Office
- 11 Portion of a map showing Tract No. 657 of Sacandaga Reservoir, prepared for the Hudson River Regulating District and maintained by DEC

- 12 Judgment of New York State Supreme Court, entered 7/24/31, concerning Tract No. 476 on the maps of the proposed Sacandaga Reservoir, as certified by the Fulton County Clerk's Office
- 13 Sketch of Tract No. 476 of Sacandaga Reservoir, prepared for Hudson River Regulating District (3/31/27) and maintained by DEC
- 14 Pages 32 - 35 of Hudson River Regulating District Field Book No. 34
- 15 Pages 49 - 50, 63 - 64, and 161 - 162 of Hudson River Regulating District Field Book No. 250
- 16 Resolution of Hudson River Regulating District (adopted 5/25/53) transferring jurisdiction of specified State lands to the New York State Conservation Department
- 17 Sheet No. 24 of Hudson River Regulating District's Sacandaga Reservoir Property Maps, as referred to in resolution received as Exhibit No. 16
- 18 Notice from New York State Conservation Department to New York State Board of Equalization & Assessment, regarding transfer to the Conservation Department of lands on the Sacandaga Reservoir for use as a public campsite (2/19/54)
- 19 Letter to Edward H. Sargent, chief engineer of Hudson River Regulating District, correcting description of lands contained in Exhibit No. 18 (3/18/54)
- 20 Order of Abandonment and Discontinuance of Use as a Highway, addressing a section of Houseman Street in the Town of Northampton, Fulton County, under the jurisdiction of the New York State Conservation Department (7/26/55)
- 21 Deed to Mark A. DeMeo from John Blizzard (5/17/96) conveying property in the Town of Northampton, Fulton County, as certified by the Fulton County Clerk's Office
- 22 Land Surveying Practice Guidelines (February 2000), published by the Office of Professions, New York State Education Dept.

- 23 Affidavit of Peter Frank (10/9/14)
- 24 Affidavit of Brian Huyck, P.E. (10/8/14), with attachments
- 25 Letter of Chris Schlegel to Matthew Ginter (9/12/12)
- 26 Letter of Matthew Ginter to Mark DeMeo (9/24/12)
- 27 Letter of Matthew Ginter to Mark DeMeo (5/20/13), with attachments
- 28 Letter of Mark DeMeo to Matthew Ginter (8/9/13), with attachments
- 29 Town of Northampton building permit renewal for new roof and siding on building at 324 Houseman Street, adjacent to Campers Last Stop store (11/14/13)
- 30 Building permit renewal application of Mark DeMeo for new roof on storage building at 324 Houseman Street (10/19/12)
- 31 Approved building permit application for reroofing of storage building at 324 Houseman Street
- 32 Schedule of Inspections for building permit received as Exhibit No. 31
- 33 Town of Northampton notice against Campers Last Stop store, ordering its oil-filled deep fryer "out of service" (6/4/14)
- 34 Survey map of 318 Houseman Street, Town of Northampton, made for Northampton Beach Properties LLC, prepared by Zareh Altounian (10/1/10)
- 35 Entity Information for Northampton Beach Properties LLC, maintained by New York State Department of State, Division of Corporations, as of 12/12/14
- 36 Deed to Northampton Beach Properties LLC from Serenity Now LLC (10/8/10) conveying property in the Town of Northampton, Fulton County
- 37 Survey map of trailer location at 318 Houseman Street, North of Northampton, made for Northampton Beach Properties LLC, prepared by Zareh Altounian (9/9/12)

- 38 Photograph of structures at 324 Houseman Street, taken by Chris Schlegel from his property in December 2014
- 38-A Sketch of Chris Schlegel depicting his and Mark DeMeo's properties on Houseman Street (12/17/14)
- 39 Map of Mark C. Blackstone showing southeast corner of lands formerly of Leroy W. Wood, now owned by Mark DeMeo (11/21/14)
- 40 Sketch of Mark C. Blackstone depicting error of closure on lands formerly of Leroy W. Wood
- 41 Permit renewal for new roof and siding on building at 324 Houseman Street, issued to Mark DeMeo (11/25/14)
- 42 1 NY Jur, Adjoining Landowners, Section 121
- 43 Pauquette v. Ray, 58 A.D.2d 950 (July 28, 1977)
- 44 Closure report of State's deed for Tract No. 657, referenced above as Exhibit No. 10 (1/20/15)

NOTE: All exhibits were received in evidence except Exhibits No. 34, 37, 41, 42 and 43, which were marked for identification only.